Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

CONSTANTINOS STAVRIDIS,

Petitioner,

v.

ENERGY ABSORPTION SYSTEMS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit is in conflict with other Circuits in weighing conflicting evidence on both subsidiary and ultimate issues of fact when reviewing motions for judgment as a matter of law?

2. Whether a conflict among the Circuits exists concerning whether a verdict can be reversed for lack of a prima facie case once the case has been fully tried on the merits?

3. Whether the Eleventh Circuit created a conflict in the Circuits by requiring the plaintiff to rebut the defendants' articulated reasons as part of his prima facie case?

Because the first question presented above will definitely be affected and the second and third questions would more than likely be affected by the resolution of the issues presently pending before this Court in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 99-536, the Petitioner asks that his Petition for Writ of Certiorari be granted. In the alternative, the Petitioner asks that his Petition for Writ of Certiorari be held and granted and that the case be remanded in light of the Court's opinion in *Reeves*.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is unpublished and reproduced in Appendix A. The district court's judgment entered on the jury verdict, its order denying, in part, respondent's motion for summary judgment, and its order denying respondent's motion for reconsideration are reproduced in Appendices B, C, and D, respectively. The Eleventh Circuit Court of Appeal's denial of Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced in Appendix E.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit entered on November 16, 1999, Petition for Rehearing and Suggestion for Rehearing En Banc denied on January 19, 2000, by Writ of Certiorari under 28 U.S.C. Section 1254(1).

STATUTE AND RULE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, *et seq.* 42 U.S.C. Section 2000e-3 provides, in pertinent part:

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other

> training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice

42 U.S.C. § 2000e-3(a).

Federal Rule of Civil Procedure 50 provides, in pertinent part:

> (b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject tot he court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for new trial under Rule 59 . . . .

Fed. R. Civ. P. 50(b).

STATEMENT OF THE CASE

1. Course Of Proceedings And Disposition By The Panel

A jury returned a verdict for the plaintiff, finding that he was disciplined and discharged in retaliation for pursuing

EEOC Charges alleging harassment because of his Greek origin and accent. App. B. The jury discredited the defendant's proffered explanations for plaintiff's treatment by finding in special interrogatories that the "act of filing EEOC charges was a motivating factor in defendant's decision to impose disciplinary sanctions" and "to terminate his employment." R1-61 (Jury Questions ## 1-2). In a separate interrogatory, the jury rejected the defendant's contention that there were "other factors which motivated" such employment decisions. *Id.* (Jury Question #3). The retaliation found by the jury was determined to have been "committed with malice or reckless indifference." *Id.* (Jury Question #7).

Prior to trial, the district court had denied summary judgment in two lengthy opinions. App. C & D. The district court also denied judgment as a matter of law under Federal R. Civ. P. 50, both during and after the trial, finding that "the evidence on the retaliation claim is strong." R4-465.

The Eleventh Circuit reversed the jury's verdict by weighing conflicting evidence for itself and reaching the opposite conclusion from that of both the jury and the trial judge. App. A-2a, 5a. The Eleventh Circuit found that "the plaintiff did not satisfy his burden of proving a *prima facie* case" because the defendant's evidence "outweighs" that of the plaintiff. App. -5a. In the court's words:

> After reviewing the evidence, this Court concludes that the defendant's motion for judgment as a matter of law should have been granted because strong evidence of Stavridis's inability to get along with other employees, and his below average performance reviews, ***outweigh*** any slight inference of retaliation; consequently, we reverse.

App. A-2a. (emphasis added). These were the same allegations against the plaintiff that the jury found not to be credible and a mere pretext for retaliation. *See* Jury Instructions and Special Jury Verdicts (R1-61; R5-698-728). The jury could not have believed the defendant's version of its motivation while still finding that retaliation was the sole motivating factor. *Id.*

2. Statement of Facts

The plaintiff was a good employee throughout his employment with the defendant, as reflected in his written performance evaluations and the testimony of himself and others which showed that his performance was not evaluated as substandard except for a brief period of several months following the filing of his EEOC Charges.[1] The district court found the evidence of poor performance after his EEOC Charge to be in conflict and subject to an inference of pretext and an intent to retaliate sufficient to warrant denial of summary judgment and judgment as a matter of law at trial. App. C-34a;App.D-45a-46a. In its opinion denying, in part, respondent's motion for summary judgment, the district court discussed much of the evidence from which a jury could infer discriminatory or retaliatory motive by the respondent. One of the alleged work rule violations proffered by the respondent was that Stavridis disrupted productivity by taking pictures or pretending to take pictures at the plant. The plaintiff denied owning a camera or that he ever pretended to take pictures. App. C-22a. Although Stavridis was suspended after receiving a written warning for this alleged violation, the district court found that "Jerry Bean, the supervisor imposing the discipline, testified that he 'couldn't substantiate that [plaintiff] was or was not' taking pictures. He therefore, issued a warning for

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[1]Pl. Exhs. ## 124 to 130; Def. Exhs. ## 5 to 11; R3-301-303; R4-315-16, 323.

'pretending' to take pictures." App. C-22a-23a.

At summary judgment and at trial, the plaintiff also presented evidence of fourteen employees who had received two written warnings, but had not been suspended like Stavirdis. App. C-23a; R3-101;R4-420-21, 424-25. Evidence was presented by the plaintiff demonstrating that Jerry Bean did not receive discipline for failing to wear a respirator while painting like Stavridis.[2] App. C-24a. In response to evidence that other employees who were not suspended after receiving two written warnings in a 12-month period, the respondent's explained that after a new computerized system came on-line in 1994 all employees having two written warning were suspended, with the exception of attendance violations, which the respondent's maintained had not been computerized until a more recent date. *Id.* at 24a-25a. The district court found that the respondent's own testimony "casts considerable doubt upon EAS's asserted reasons for suspending plaintiff." *Id.* at 25a. In finding that the plaintiff had raised a genuine issue of fact as to the reasons for his discharge, the district court found:

> In fact, EASI's entire explanation fails because of one employee. Deborah J. Castleberry received written warnings for attendance violations on December 5, 1995 and on April 30, 1996, but she was not suspended. (Janis Jones Deposition, Exhibit 20, pg 10.) Castleberry's first warning occurred late enough in 1995, that even crediting EASI's explanation,

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[2]The respondent's response to this evidence was that Bean did not paint as much as Stavridis and was not exposed to spray when he did paint. App. C-24a. The district court found that "EASI presented no evidence of company rules forging Bean's failure to use a respirator. Therefore, there is sufficient evidence to withstand EASI's motion for summary judgment." *Id.*

> she should have come within the "new" attendance program. Yet, the supposedly foolproof computer system still failed to indicate that Castleberry that Castleberry should receive a suspension.
>
> The system actually does not determine the issuance of suspensions. Instead, it merely is an electronic system for holding data, and human management retain responsibility for deciding the merit of suspensions. Janis Jones, Administrative Support Manager for EASI's plant, state that she enters warnings into the computer system, which informs here if the employee in question has another written warning. (Jones Deposition, at 28.) She then refers to EASI's Vice President for Manufacturing to determine if a suspension should be given. (Jones Deposition, at 27-28.) Furthermore, Jones indicated that she still uses the employee's personnel file as a basis for determining the number of written warnings issued. *Id.*

App. C-25a.[3]

The jury resolved the conflicting evidence in Stavridis' favor and, by doing so, necessarily made credibility determinations that were the opposite of those made by the

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[3] In denying the respondent's motion for reconsideration, the district court noted that the evidence regarding the failure to suspend Castleberry for two written warnings "also questions the failure to discipline those employees who received two written warnings before the system was implemented: Timothy W. Daffon, Jerry E. Dulaney, Ronald M. Lawyer, and Terell D. Lewis." App. D-41a.

Eleventh Circuit in reversing the jury's verdict.

The Eleventh Circuit's reversal is based on four appellate findings of fact that require credibility determination opposite that of the jury. First, the Eleventh Circuit found that the plaintiff was unable to get along with his co-workers, but the defendant's written evaluations showed that he always got the highest possible rating on this factor in the three years before he filed his EEOC Charges in March 1995, and several witnesses at trial testified positivey to his ability to get along with others.[4]

Second, the Eleventh Circuit found that plaintiff had "low productivity" (App. A-5a), but again the defendant's written performance evaluations showed he was observed to

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[4]In all seven of his written performance appraisals before his March, 1995 EEOC Charge, the plaintiff was given *the highest* of two possible ratings on *every* performance factor related to ability to get along with other employees, including the following:

- "Teamwork: Employee's willingness to work as part of the EAS team"
- "Attitude: Consider employee's attitude in working, as a team member, . . . etc."
- "Self Direction and Initiative: Consider employee's willingness to initiate productive work, level of supervision required, etc."

Pl. Exhs. #124 to #130; Def. Exhs. #5 to #11; R3-301-303; R4-315-316, 323. Such written evaluations show on their face that the plaintiff was not considered to have an "attitude" or "teamwork" problem until *after* he filed his first EEOC Charge in his third year of employment. *Compare id. with* Pl. Exh. #123. The testimony of several witnesses also contradicted the Eleventh Circuit's finding that the plaintiff was unable to get along with other employees by showing that he got along with others just fine. R3-258-263 (Collins); R3-305 (Mays); R4-471-476,486; R5-544 (Reynolds); R3-178, 127; R2-56; Pl. Exh. #124 to #130; R3-299.

have good productivity until he filed his first EEOC Charge, that his actual productivity did not change thereafter but his evaluation did, and that in the last evaluation period before his discharge his productivity was admitted to be satisfactory.[5]

When the defendant's decisionmaker, Jerry Bean, admitted that the plaintiff's productivity was satisfactory and that there were no negative events or incidents in the plaintiff's last five months of employment, as indicated by the lack of any written notes about difficulties or disputes during that period (R4-405-406, 409), he was hardpressed to explain why then the plaintiff was discharged. His answers were contradictory, first reverting to his "productivity" criticism that was contradicted by the "satisfactory" rating on his written evaluation for his last five months of employment, then switching to "complaints that had been rehashed over and over again" that had already been contradicted by his testimony that there were no notes of any such incidents during plaintiff's last five months before his

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[5]Before filing his EEOC Charge, the plaintiff was consistently rated "satisfactory" on productivity and received positive "comments" on his evaluations, but once the Charge was filed he was suddenly criticized for low productivity "throughout [his] tenure." *Compare* App. A-3a *with* Pl. Exh. #124 to #130. After initially lowering his productivity rating in a brief period immediately following that Charge in March, 1995, the defendant was forced to return his productivity to the satisfactory "2.0" level on the evaluation for his last five months of employment from "9-13-95 to 2-13-96." Pl. Exh. #134. Even for that brief period in mid-1995, the plaintiff testified that his performance and attitude *was the same* after he filed his first EEOC Charge in March, 1995 than it had been before such charges when he was rated as acceptable on everything. R3-122. The plaintiff directly denied that his production declined after he filed his EEOC Charge in March, 1995 and testified that 'if you look at my papers on my production, you will see that." R3-113. The defendant admitted that it kept production records, but failed to produce them at trial. There were also admissions against interest from the defendant's officials that the plaintiff "was a good worker and had good production" (R3-286, 292-293), "was a good hard worker" (R3-293) and had "good evaluations." R3-302-303.

discharge. *Compare* R4-380-381 *with* R4-405-406; R2-109-110.

Third, the Eleventh Circuit found that plaintiff's performance evaluations were poor "throughout [his] tenure" with the defendant, but again the evidence showed otherwise. Stavridis was evaluated as a good employee not just in his exceptional attendance record, but in *every* other performance and behavior category on his seven written evaluations before his EEOC Charge, including "productivity", "quality of work", and overall performance. Pl. Exh. #124 to #130. The written "comments" on the evaluations reflected *positively* on the plaintiff's performance and further undermined the credibility of the defendant's stated explanation of its motivation.[6] *Id.* The defendant's decisionmaker, Jerry Bean, admitted that he evaluated the plaintiff's performance as "good" and "acceptable on everything" as of the last evaluation in February, 1995 before he filed his first EEOC Charge a month later. R3-303; R4-315-316, 323. Bean also admitted that Stavridis' last pre-EEOC Charge performance appraisal showed a "performance trend" that was on an *upward* slope. R3-301-303; R4-315-316, 323; PX #130; PX #13. The defendant's false contention that the plaintiff had poor performance "throughout [his] tenure" undermined the credibility of its *entire* explanation of its motive. *See* App. A-3a.

Once the plaintiff filed his first EEOC Charge, the

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[6]Throughout the written "comments" on the appraisals, unlike the defendant's verbal characterizations of such comments, the defendant repeatedly said such things as "Gus works well with the employees", "Gus meets all the requirements of the assigned tasks", "Gus produces a standards quality product", "Gus produces at a standard rate as set by assembly standards and is getting higher daily", "Gus quality of work is standard and satisfactory", "His use of equipment, completion of work, accuracy and planning are satisfactory", "Normal supervision is required," etc. *Id.*

defendant reached back into the pre-Charge period to change its assessment of plaintiff's theretofore "good" record. Two minor warnings on safety issues — rotation of his safety glasses to his forehead when they became fogged by a malfunctioning washing machine and painting with a dusk mask rather than a respirator — suddenly became grounds for discharge once the Charge was filed, although they had not been enough to even lower his performance evaluation before such Charge was filed. Pl. Exh. #124 to #130. Similarly friction between employees on the shop floor — which had been so minor at the time it occurred that the plaintiff still received the highest of two possible ratings on "attitude" and "teamwork" on his written evaluations — were suddenly resurrected to become the principal ground for discharge even though such events occurred well before his EEOC Charge and resulted in no discipline at the time. *Id.* The defendant admitted that no new incidents occurred in plaintiff's last five months of employment, as evidenced by the lack of any notes of any such events during that period. R4-405-406, 409.

Fourth, the contradictory testimony about why the plaintiff was discharged on the heels of a five-month satisfactory evaluation of his productivity was further undermined by two additional facts: (1) the discharge decision occurred only ten days after the defendant received notice that the EEOC had terminated its processing of plaintiff's EEOC Charge and issued a right-to-sue letter (R4-405-406); and (2) the discharge was done hurriedly in a manner that violated the defendant's own written policy which required three written warnings in a twelve month period to discharge. *Compare* Def. Exh. #2, p. 43 *with* Def. Exh. 139. That policy states that "[a] combination of any *three* written warnings in a twelve (12) month period may result in an employee's dismissal," but the defendant's own record of his discipline showed that the plaintiff had only two written warnings in the twelve months

preceding his discharge — one on March, 1995 and one on September, 1995. *Id.* (emphasis added).

The defendant's decisionmaker admitted that he was "frustrated" with the plaintiff because of the complaints he made and that such complaints, in part, appeared in EEOC Charges and proceedings. R4-322, 319, 455. There was also comparative evidence which showed that employees with more severe problems in getting along with others were not disciplined or discharged.[7] *Id.*; PX #103; DX 139.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Is In Conflict With Every Other Circuit In Weighing Conflicting Evidence On Both Subsidiary And Ultimate Issues Of Fact When Reviewing Motions For Judgment As A Matter Of Law

Judgment as a matter of law in the Eleventh Circuit involves an explicit weighing of conflicting evidence on both subsidiary and ultimate issues of fact, as shown in the holding below that "the defendant's motion for judgment as a matter of law should have been granted because strong evidence of Stavridis's inability to get along with other employees, and his

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[7]Jeff Lloyd had a record of non-cooperation and harassment of co-workers, including intentional disruption of production by switching off the gas, turning out the lights, threatening violence, cursing at co-workers calling them "son of a bitch" and "motherfucker," and throwing metal objects and causing bodily injury. R2-73-81. Lloyd's harassment and inability to get along with his co-workers was reported to management and went unaddressed, as was that of Dwight Madden. *Id.* Dwight Madden refused to stay on his job or to work cooperatively with the plaintiff, cursed him by calling him a "son of a bitch," screamed at him, and generally disrupted production. *Id.* and R3-128. The plaintiff testified directly that he didn't bother the other employees, they bothered him. R2-109, 123.

below average performance reviews, *outweigh* any slight inference of retaliation; consequently, we reverse." App. A-3a, 5a (emphasis added). The Court did not merely weigh the evidence *that supported* the jury's verdict, but went further to weigh *conflicting evidence* on both subsidiary factual issues (such as whether the plaintiff was able to get along with others, had "low productivity," or had poor evaluations "throughout his tenure") and the ultimate factual issue of intent to retaliate which depended on those subsidiary facts.[8]

The foregoing approach to judgment as a matter of law in the Eleventh Circuit is in conflict with every other Circuit. *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 731 (1st Cir. 1999) ("In reviewing the denial of a request for such a judgment we 'may not assess the credibility of witnesses, evaluate the weight of the evidence or resolve conflicts in testimony, but rather must view all facts and reasonable inferences therefrom in the light most favorable to the non-movant.'") (citations omitted); *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 68 (1st Cir. 1993) ("Credibility determinations and evidence weighing are not grist for the Rule 50(b) mill."); *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998) (JMOL is improper "unless 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict . . . .'

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[8]The subsidiary factual findings by the Eleventh Circuit – that there was "strong evidence of Stavridis's inability to get along with other employees and his below average performance reviews" – were in direct conflict with the defendant's own written performance evaluations and other evidence which showed that he had good performance appraisals and got along well with his co-employees throughout the period prior to his EEOC Charge, as well as in his last performance evaluation a few days before his termination. The district court denied summary judgment because the evidence on these points were in conflict (App. C-23a-25a, 34a), and the jury necessarily discredited the defendant's evidence on these points in ruling for the plaintiff.

Weakness of the evidence does not justify judgment as a matter of law . . . .") (citations omitted); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 161 (2d Cir. 1998) ("In assessing such a motion, the court is not allowed to weigh the credibility of witnesses or consider the weigh of the evidence."); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998) ("[W]e are not permitted to retry factual findings or credibility determinations reached by the jury. Rather, we are to assume that testimony in favor of the non-moving party is credible, 'unless totally incredible on its face,' and ignore the substantive weight of any evidence supporting the moving party.") (citations omitted); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588 (5th Cir. 1998) (". . . although 'we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to reevaluate credibility of witnesses."); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 154-55 (6th Cir. 1988) ("Thus, we do not 'weigh the evidence, pass on the credibility of witnesses, or substitute [our] judgment for that of the jury. * * * The evidence of a violation was not overwhelming . . . . Nevertheless, there was admissible evidence from which an inference could reasonably be drawn that age was 'a factor'. . . ."); *Hybert v. The Hearst Corp.*, 900 F.2d 1050, 1054 (7th Cir. 1990) ("Moreover, we are particularly careful in employment discrimination cases to avoid supplanting our view of the credibility or weight of the evidence for that of both the jury (in its verdict) and the judge (in not interfering with the verdict)."); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989) ("In employment discrimination suits, the credibility of witnesses is often crucial. Appellate courts should not interfere with the jury's determination as to which witnesses to believe.") (citations omitted); *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) ("We do not judge the credibility of witnesses * * * and we do not reweigh the evidence as a jury would, attempting to find a

preponderance on one side of the other.") (citations omitted); *Thorne v. Welk Inv., Inc.*, 197 F.3d 1205, 1210 (8th Cir. 1999) ("Where, as here, a jury has been presented with conflicting testimony, we will not ordinarily disturb the verdict on appeal."); *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987) ("Neither the trial court nor we may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists."); *Deters v. Equifax Credit Info. Serv., Inc.*, 202 F.3d 1262, 1268 (10th Cir. 2000) ("Equifax is only entitled to judgment as a matter of law if the 'evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion.'. . . In our review of the record, we will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury.") (citation omitted); *United States v. Howard Univ.*, 153 F.3d 731, 735 (D.C. Cir. 1998) ("In making that determination, a court may not assess the credibility of witnesses or weigh the evidence. . . . Moreover, '[b]ecause a judgment as a matter of law intrudes upon the rightful province of the jury, it is highly disfavored.'") (citations omitted); *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1192 (Fed. Cir.1998) ("It is not the province of an appellate court to second guess the jury's credibility determinations or to reevaluate the weight to be given the evidence.").

In other words, weighing the evidence *in favor of* the verdict is permissible, weighing *conflicting* evidence is not. The Eleventh Circuit's decision here does not distinguish between the two, but proceeds to weigh *conflicting* evidence on both the ultimate factual issue of intent to retaliate and the subsidiary facts that are the predicate to that ultimate finding of fact.

The question under Rule 50 is not whether the defendant's case "outweighs" the plaintiff's — that is an issue

relevant only to a discretionary grant of a new trial under Rule 59 — but whether the jury had reason to disbelieve the defendant's articulated reason for plaintiff's discharge. *See, e.g., Deters,* 202 F.3d at 1268; *Howard Univ.,* 153 F.3d at 734.

The problem presented by the Eleventh Circuit's decision arises partly from the conflict between circuits at issue in *Reeves v. Sanderson v. Plumbing Products, Inc.*, Pet. No. 99-536, for which *certiorari* has been granted and oral argument heard in March of this year. The law of the Eleventh Circuit grows out of the same standards from the former Fifth Circuit set forth in *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*) which are on review in *Reeves*. The current case demonstrates the creeping error that follows *Boeing's* "all the evidence" standard and the wisdom of the Eighth and Fourth Circuit's rule which restricts the court to reviewing just that evidence which supports the jury's verdict.

In determining that the defendant's evidence "outweighs" that of the plaintiff's, the Court necessarily considered *all of the defendant's evidence* rather than restricting itself to those few parts that were not in conflict or subject to the jury's assessment of credibility. Because "the court is not to consider questions of credibility" when deciding a judgment as a matter of law, "[t]hat statement necessariiy implies that evidence favorable to the moving party may not be considered because if it were the court would have to pass on the credibility of that party's witnesses." *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983); s*ee also Cline*, 144 F.3d at 301 ("We are to assume that testimony in favor of the non-moving party is credible 'unless totally incredible on its face', and ignore the substantive weight of any evidence supporting the moving party.").

By considering subsidiary facts that are the subject of

conflicting evidence in determining whether there is sufficient evidence in support of the ultimate factual issue of intent to discriminate, the Eleventh Circuit went far beyond the permissible bounds for judgment as a matter of law. It necessarily credited the defendant's version of the conflicting evidence on the questions of whether the plaintiff could get along with his co-workers and otherwise perform his job when it took those facts as established and then determined that they "outweighed" the evidence of a retaliatory motive. The inference favorable to the jury's verdict that was due to be drawn for purposes ruling on a motion for judgment as a matter of law was that the defendant did not tell the truth when it accused the plaintiff of being unable to get along with others or perform his job because all of his pre-EEOC Charge performance evaluations were good, as was his last performance evaluation right before his discharge. The only poor evaluations were in the immediate eight-month aftermath of his EEOC Charges from March to October, 1995, which was a fact which supports the jury's verdict rather than undercutting it.

Here, the plaintiff showed through his written performance evaluations and the contradictory testimony of the decisionmaker that the defendant's proffered explanation for his discharge — that "[t]hroughout Mr. Stavridis's tenure at EASI his performance reviews reflected consistent discipline problems and difficulty getting along with other employees" (App. A-3a) — was unbelievable. *See* pp. 3-11, *supra*. Such credibility issues should have precluded reversal of the jury's verdict, but the Eleventh Circuit allowed "weighing" of the relative strengths of each party's evidence and supplanted its view of the evidence in place of the jury's finding of retaliation by concluding after reviewing the evidence that "the defendant's motion for judgment as a matter of law should have been granted because [defendant's] evidence of Stavridis's inability to get along with other employees, and his below

average performance reviews *outweigh* slight inferences of retaliation; consequently we reverse." App. A-2a.

Because the issue of intent ultimately involves a credibility choice,[9] it is not just demonstrable contradictions in the defendant's explanation of its motive that are critical to a jury's credibility determination, but also traditional considerations of demeanor, bias, and lack of disinterestedness. This Court has held that "the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sartor v. Natural Gas Corp.*, 321 U.S. 620, 628 (1944). The Court has further held that "[t]here are many things sometimes in the conduct of a witness upon the stand and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony." *Id.* (quoting *Sonnentheil v. Christian Moelein Brewing Co.*, 172 U.S. 401, 408 (1899); *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946); *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944)).

The jury below was given detailed instructions on assessing the credibility of witnesses which have not been argued as erroneous on this appeal. R5-704-709. They were

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[9]This Court has held that the ultimate issue in a Title VII case is one of credibility. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983). Because the plaintiff may prove intent "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence," the trier of fact "must decide which party's explanation of the employer's motivation it believes." *Id.* In *St. Mary's*, the Court held that "rejection of the defendant's proffered reason will *permit* the trier of fact to infer the ultimate fact of intentional discrimination and ... upon such rejection 'no additional proof of discrimination is *required*." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 509, 511 (1995) (citation omitted).

instructed:

> In assessing the credibility or believability of a witness and when weighing that witness' testimony, you may take into account such common sense things as the intelligence and memory of each witness, as well as the appearance and demeanor of each witness while on the stand, the manner in which the witness sat in the witness chair, the manner in which the witness testified, and the witness' ability to relate to you the things he or she claims to have seen, heard, or done. You may consider whether a witness appeared to exhibit a frankness, fairness, and candor, in giving testimony or exhibited a lack of such qualities.

R5-706-707. Although these are standard jury instructions on assessing credibility, the Court's decision allows no room for such factors to be integrated into the analysis on appeal.

The Eleventh Circuit unabashedly adopted the respondent's view of the evidence and supplanted the jury's and the district court's findings with its own view of how it would have decided the case. This overreaching review improperly invaded the function of the jury and trial judge presiding over trial. The "clearly erroneous" standard of review under Rule 52 governing findings of fact made by the trial court is analogous to the highly deferential standard of review under Rule 50. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). Under both standards, it is solely within the province of the fact-finder to make credibility determinations and to resolve conflicting testimony and evidence. *Compare Anderson*, 470 U.S. at 575 (credibility determinations "demands even greater deference to the trail court's findings; for only the trial judge

can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said") *with Hybert,* 900 F.2d at 1054 ("we are particularly careful in employment discrimination cases to avoid supplanting our view of the credibility or weight of the evidence for that of both the jury (in its verdict) and the judge (in not interfering with the verdict)").

As with an appellate court reviewing a trial court's findings under Rule 52, once the Eleventh Circuit determined that there were two competing inferences (i.e., inference of retaliation vs. inference of poor performance), the appellate court should have affirmed the verdict as the sole trier of fact already resolved these competing inferences in favor of Stavridis. *See Andersen,* 470 U.S. at 575 (where trial court credits one witness' testimony over other witness' testimony "each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error"); *Kim v. Nash Fink Co.,* 123 F.3d 1046, 1061-62 (8th Cir. 1997) ("The evidence in this case presented inconsistent inferences to the jury, and the resolution of this conflicting evidence was a matter for the jury to resolve."); *cf. Ramseur v. Chase Manhattan Bank,* 865 F.2d 460, 467 (2d Cir. 1989) (where two permissible inferences exist, "[t]he question of which inference to draw . . . is a matter exclusively within the province of the jury").

The Eleventh Circuit's re-weighing of the evidence and *de novo* determination in contradiction of the jury's and district court's conclusions has resulted in triplication of efforts among the jury, district court and appellate court. *Cf. Reeves,* Cert. Pet. No. 99-536. In the context of non-jury cases, this Court cautioned against such a wasteful use of judicial resources. "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of

the fact determination and at a high cost in diversion of judicial resources." *Anderson*, 470 U.S. at 574-75; *see Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993) ("the cost of providing 'duplicate' decisions . . . outweigh the benefits . . . of *de novo* judicial review."); *Herold v. Burlington N., Inc.*, 761 F.2d 1241, 1245 (8th Cir.), *cert. denied*, 4474 U.S. 888 (1985) (holding that since the trial judge and jury heard and reviewed the evidence first hand, "[a]ppellate court should be extremely reluctant to interfere with a verdict where twelve jurors sit through a long trial and an experienced and competent trial judge finds no error in the jury's determination."). When reviewing a district court's denial of judgment as a matter of law after the jury has resolved the conflicting inferences in favor of the plaintiff, the appellate court is prohibited from re-evaluating the evidence and the inferences to be drawn and making its own *de novo* determinations as to which inferences are "slight" and which are "overwhelming" in contradiction of the jury's determination and district court's review. *Cf.* App. A-5a. By engaging in its own weighing of the evidence, the Eleventh Circuit has created a conflict in the Circuits and with this Court's precedent.

II. A Conflict In The Circuits Exists Concerning Whether A Verdict Can Be Reversed For Lack Of A Prima Facie Case Once The Case Has Been Fully Tried On The Merits

The Eleventh Circuit reversed the jury's verdict "because the plaintiff did not satisfy his burden of proving a *prima facie* case." App. A-5a. In denying, in part, respondent's motion for summary judgment, the district court found that Stavridis established a prima facie case of retaliation. In its memorandum opinion, the district court held:

> Jerry Bean testified that he was informed

> of plaintiff's first EEOC charge when EASI's "front office" received it. (Bean Deposition, at 42.) Plaintiff received his first unsatisfactory evaluation during the first review period thereafter.
>
> Also, plaintiff was discharged within two weeks of receiving his right to sue letter. Bean's knowledge of the complaints, his participation in the decision to terminate, and the temporal proximity between the EEOC complaints and alleged retaliation are sufficient to establish a *prima facie* case of retaliation. *See Donnellon,* 794 F.2d at 600-01 (one month delay between complaint and discharge sufficient to establish causal connection).

App. C-34a.

Upon denying respondent's motion for reconsideration of the district court's grant of partial summary judgment, the district court again found that Stavridis had established a prima facie case of retaliation and that there was a genuine issue for the jury decide whether the respondent's reason for discharge (i.e., poor performance) was pretextual. The district court explained as follows:

> This court refused to grant summary judgment for the defendant on plaitniff's retaliation claim, because defendant failed to explain the timing of plaintiff's discharge . . . . On reconsideration, defendant claims that plaintiff was given addition time to improve his performance because of sexual harassment allegations which were made against him.

. . .

> Because of the sexual harassment allegations, plaintiff was given until the end of December of 1995 to improve his performance. Yet, no performance evaluation was conducted at the end of December, or at any time before the February 13, 1996 evaluation which led to plaintiff's termination. That evaluation occurred eight days after defendant learned plaintiff received a notice of right to sue from the EEOC.
>
> Defendant still fails to explain why it waited two months to discharge plaintiff, when he only was given until the end of the year to demonstrate improvement. Further, defendant fails to explain the timing between the notice of right to sue and the evaluation. Accordingly, the motion to reconsider the court's retaliation ruling is denied.

App. D-44a-46a.

In *U. S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711(1983), the court explained the error of returning to the *prima facie* case after the case has been fully tried:

> Because the case was fully tried on the merits, it is surprising to find the parties *and the Court of Appeals* still addressing the question whether *Aikens* made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.

Id. at 714-716 (emphasis added); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 245-47, 260-261 (1989); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-511 (1993).

The Eleventh Circuit's resurrection of the *prima facie* issue after the current case had been fully tried materially affected the outcome of this appeal because that issue is distinctly different from the one appropriate to a post-verdict judgment as a matter of law — as seen in the next section of this petition. It is hard to imagine that the panel would have reversed the jury's credibility determinations in this appeal if it had not attempted to revisit the prima facie case rather than ruling on the ultimate issue of retaliation *vel non* as required by the law of this Circuit and the Supreme Court's decisions in *Aikens* and *St. Mary's*.

III. The Eleventh Circuit Created A Conflict In The Circuit's By Requiring The Plaintiff To Rebut The Defendant's Articulated Reasons As Part of His Prima Facie Case

By hinging its reversal of the jury verdict on its finding that Stavridis failed to prove a prima facie case of retaliation based upon the respondent's articulated reasons of poor performance, the Eleventh Circuit not only improperly resurrected the prima facie case after trial, but also imposed a heightened burden of proof on Stavridis by requiring him to disprove the defendant's articulated reason at the prima facie case stage. In *Jalil v. Avedel Corp.*, 873 F.2d 701 (1988), *cert. denied*, 493 U.S. 1023 (1990), the Third Circuit held that it was improper to impose such a requirement:

> The district court here held that Jalil failed to establish a prima facie case of discrimination and retaliatory discharge because, it concluded,

> qualification for the job was an essential element of both claims, and Jalil's unquestionable insubordination made him unqualified. We reject the district court's analysis. Insubordination, under the *McDonnell Douglas* method of proof, plainly is not something the plaintiff must disprove to succeed at the first level of proof, but rather it is more logically a defense that is raised at the second level to meet the plaintiff's prima facie case of discrimination.

Id. at 707 (citations omitted).

The Sixth Circuit's recent opinion in *Cline v. Catholic Diocese of Toledo*, ___ F.3d ___, 2000 WL 272258 (6th Cir. March 14, 2000) also is in conflict with the heightened burden imposed by the Eleventh Circuit at the prima facie case stage. In *Cline*, the district court granted summary judgment against the plaintiff finding that she failed to prove she was qualified for purposes of establishing a prima facie case. In reversing this finding, the Sixth Circuit held:

> The prima facie phase "merely serves to raise a rebuttable presumption of discrimination by 'eliminati[ing] the most common nondiscriminatory reasons for the [employer's treatment of the plaintiff].'" It is "only the first stage of proof in a Title VII case," and its purposed is simply to "force [a] defendant to proceed with its case." This division of intermediate evidentiary burdens is not meant to stymie plaintiffs, but simply serves to "bring litigants and the court expeditiously and fairly to the ultimate question."

> The district court ignored these precepts when it held that Cline failed to bake a prima facie showing. In addition to setting a burden far too high, it conflated the distinct stages of the *McDonnell Douglas* inquiry by using St. Paul's "nondiscriminatory reason" as a predicate for finding Cline to have failed to make a prima facie case. . . . In other words, when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine the plaintiff's evidence independent of the nondiscriminatory reason "produced" by the defense as its reason for terminating plaintiff.

Catholic Diocese, 2000 WL at *5.

CONCLUSION

Based on the foregoing, Petitioner asks that his Petition for Writ of Certiorari be granted. In the alternative, Petitioner asks that his Petition for Writ of Certiorari be held and granted and that the case be remanded in light of the Court's opinion in *Reeves*.

Respectfully Submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 16, 1999

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 98-6828

D.C. Docket No. 96-CV-1129

CONSTANTINOS STAVRIDIS,

Plaintiff-Appellee,

versus

ENERGY ABSORPTION SYSTEMS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(November 16, 1999)

Before ANDERSON, Chief Judge, TJOFLAT, Circuit Judge, and FAY, Senior
Circuit Judge

PER CURIAM:

Plaintiff-Appellee, Constantinos Stravridis, alleged that he was discriminated against on the basis of national origin and that his employer, Energy Absorption Systems, Inc. ("EASI"), retaliated against him because he filed a grievance with the Equal Employment Opportunity Commission ("EEOC"). As a result of trial, the jury determined that national origin was not a motivating factor behind any discrimination but that retaliatory motives were a part of the dismissal of Mr. Stavridis. EASI appeals the denial of its motion for a judgment as a matter of law regarding the dismissal of the retaliation claim on the theory that this issue should not have been sent to the jury because Plaintiff did not establish a prima facie case of retaliation. EASI claims that Stavridis did not prove a causal link between the filing of an EEOC claim and his discharge. After reviewing the evidence, this Court concludes that the defendant's motion for judgment as a matter of law should have been granted because strong evidence of Stavridis' inability to get along with other employees, and his below average performance reviews, outweigh any slight inference of retaliation; consequently, we reverse.

Mr. Stavridis was hired by EASI in April 1992. From the time of his employ until his termination, in February of 1996, EASI had consistent difficulties in placing Mr. Stavridis on an assembly line where he could work peacefully with his co-employees. EASI employees receive evaluations after their first three months and every six months thereafter. Employees receive scores on a scale-- 4.0 being the highest, 2.0 is considered satisfactory. If an employee receives two

consecutive unsatisfactory performance reviews it is grounds for termination. Additionally, if an employee receives two written warnings within a twelve-month period, it results in an automatic three-day suspension.

Throughout Mr. Stavridis's tenure at EASI his performance reviews reflected consistent discipline problems and difficulty getting along with other employees. From May 1992 through February 1995, Mr. Stavridis received satisfactory performance reviews; however, his highest performance review was only a 2.2. Furthermore, as noted in his reviews, the above satisfactory scores were attributed only to his attendance, rather the comments to the evaluations alluded to consistent problems with productivity and performance. Additionally, Mr. Stavridis received multiple verbal and written warnings regarding his insubordination and his inability to follow rules and abide by supervisory instruction. Consistent with the employment policy, and the treatment of other employees, upon the issuance of multiple written warnings Mr. Stavridis was suspended for three days. By Mr. and Mrs. Stavridis' own admissions, it was after his suspension that he began to have more difficulty at work, and his performance reviews slipped from just above satisfactory to just below. Mr. Stavridis received four below satisfactory evaluations before he was finally discharged in February 1996.

Mr. Stavridis filed a complaint in April 1996 alleging that he was discriminated against on the basis of national origin and that he was illegally retaliated against for filing a complaint with the EEOC. He originally asserted claims under Title VII (42 U.S.C. § 200e et seq.) and under 42 U.S.C. § 1981. The trial court correctly dismissed the claims under 42 U.S.C. § 1981 as this section does not afford protections based on national origin. The trial court did not dismiss the Title VII claims, consequently a trial ensued to resolve the issues of whether Mr.

Stavridis was discriminated against because of his Greek origin and whether EASI retaliated against him as a result of his charge filed with the EEOC. The jury concluded that there was no discrimination on the basis of national origin but that retaliation was a factor in the termination. EASI moved for judgment as a matter of law both at the end of the plaintiffs case and again at the conclusion of all of the evidence. Instead, the trial court entered judgment consistent with the jury verdict, at which time, EASI renewed its motion for judgment as a matter of law. The trial court again denied this motion at which point the defendant appealed.

This Court reviews denials of renewed motions for judgment as a matter of law de novo. Carter v. DecisionOne Corp. Through C.T. Corp. System, 122 F.3d 997, 1004 (11th Cir. 1997). A judgment as a matter of law is appropriate when there is no legally sufficient basis for a reasonable jury to find in favor of a party. Id. at 1003. If a party does not provide sufficient evidence to establish all of the elements of a prima facie case, judgment as a matter of law is appropriate. Berman v. Orkin Exterminating Co. Inc., 160 F.3d 697, 701 (11th Cir. 1998). In the case at hand, Plaintiff Stavridis did not satisfy his burden of establishing a prima facie case; consequently, judgment as a matter of law would have been appropriate and this issue should not have been heard by a jury.

In order to establish a prima facie case of retaliation, the plaintiff must show: (1) he engaged in a protected activity; (2) his employer was aware of that activity; (3) he suffered an adverse employment action; and (4) there was a causal link between his protected activity and the adverse employment action. Maniccia v. Brown ,171 F.3d 1364, 1369 (11th Cir. 1999). Mr. Stavridis's case runs afoul of the fourth element of this test. Mr. Stavridis claims that the close temporal proximity between his filing of the EEOC charges and his ultimate

termination gives rise to an inference of retaliation. Here, the first EEOC charge was filed on March 29, 1995, the second was filed on September 13, 1995. Mr. Stavridis was discharged on February 19, 1996. Therefore, the gap between the protected activity and the adverse employment action is at minimum five months, and as great as eleven months.[10] Additionally, any slight inference of retaliation that may arise as a result of the temporal proximity is outweighed by the overwhelming evidence of Mr. Stavridis's inability to get along with co-workers and supervisors, his low productivity, and his marginal to below satisfactory performance evaluations. Unfortunately, the evidence shows beyond question that Mr. Stavridis was simply not a competent acceptable employee. Therefore, judgment as a matter of law would have been appropriate because the plaintiff did not satisfy his burden of proving a prima facie case and this issue should not have been presented to a jury.

REVERSED.

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[10]In *Maniccia v. Brown,* the Court discussed the use of temporal proximity to create an inference of a causal link between the protected activity and the adverse employment action. 171 F.3d 1364, 1370. The Court held that 15-months clearly did not give rise to an inference of retaliation. Id. The Court also cited other cases where the temporal relationship did not create an inference of retaliation. See O'Connor v. Chicago Transit Auth., 985 F.2d 1362, 1370 (7th Cir. 1993) (9-month gap is not sufficient to create inference of retaliation); Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) (13-month gap did not allow for inference of a causal link); Connor v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (4-month delay between the protected activity and the adverse employment action did not create an inference of causation).

APPENDIX B – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED JULY 31, 1998

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NUMBER

96-S-1129-S

CONSTANTINOS STAVRIDIS,

Plaintiff,

vs.

ENERGY ABSORPTION SYSTEMS, INC.,

Defendant.

JUDGMENT

In accordance with the jury verdict rendered July 30, 1998, it is hereby ORDERED, ADJUDGED and DECREED that plaintiff have and recover of defendant the sum of One Hundred Twelve Thousand and no/100 Dollars ($112,000.00) and costs of court.

DONE this 31st day of July, 1998.

s/Lynwood Smith
United States District Judge

APPENDIX C – ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED SEPTEMBER 24, 1997

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NUMBER
96-S-1129-S

CONSTANTINOS STAVRIDIS,

Plaintiff,

vs.

ENERGY ABSORPTION SYSTEMS, INC.,

Defendant.

ORDER

In accordance with the memorandum opinion entered contemporaneously herewith, it is ORDER that defendant's motion to strike is GRANTED, and the alleged statements of Roger Reynolds were not considered in deciding defendant's motion for summary judgment. It is further ORDERED that defendant's motion for summary judgment is GRANTED as to

plaintiff's claims for : (1) discrimination under 42, U.S.C. § 1981; (2) discrimination in promotion, job assignments, and "other terms and conditions of employment"; and. (3) national origin harassment. Finally, it is ORDERED that defendant's motion is DENIED as to plaintiff's claims for: (1) discipline discrimination; (2) discharge discrimination; and (3) retaliation.

DONE this 17th day of July, 1997.

/S/ Lynwood Smith
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NUMBER
96-S-1129-S

CONSTANTINOS STAVRIDIS,

Plaintiff,

vs.

ENERGY ABSORPTION SYSTEMS, INC.,

Defendant.

MEMORANDUM OPINION

This action is before the court on defendant's motion for summary judgement and motion to strike portions of plaintiff's evidentiary submission. Plaintiff Constantinos Stavridis, a native of Greece, asserts that defendant Energy Absorption Systems, Inc. ("EASI") discriminated and retaliated against him because of his national origin in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C § § 2000 et seq. Plaintiff further asserts discrimination claims under 42 U.S.C § 1981. Upon consideration of the motions, pleadings, briefs, and evidentiary submissions, this court determines that defendant's motion to strike is due to be granted, and that defendant's motion for summary judgement is due to be granted in part but also denied

in part.

I. MOTION TO STRIKE

After plaintiff submitted evidence in opposition to EASI's motion for summary judgement, EASI filed a "Motion to Strike Portion of Respondent's Evidentiary Submission." This uncontested motion sought to strike testimony by the plaintiff as hearsay, because it concerned alleged statements made by another EASI employee, Roger Reynolds.

Plaintiff received two written warnings for safety violations, and was suspended under EASI's disciplinary policy. In deposition, plaintiff attempted to establish that other EASI employees also received two written warnings for conduct violations, but were not suspended. Plaintiff testified that Roger Reynolds told him that he had received written warnings for failure to wear safety shoes and for failure to wear a respirator, but no suspension. (Plaintiff's deposition, at 168-69.)

Clearly, statements attributed to Reynolds are offered to prove the truth of the matter asserted -- that Reynolds received two written warnings, but no suspension. Consequently, plaintiff's testimony will be considered inadmissible hearsay unless it can be deemed non-hearsay under Rule 801 of the Federal Rules Of Evidence, or unless it fits within an exception to the hearsay rule under 803 or 804.

The court cannot ascertain an exception under Rule 803 or Rule 804 which is applicable to the statements in question. In fact, the only possible way to admit the statements in question is under Rule 801 (d) (2) (D), which says that a statement is "not hearsay" if offered against a party, and, it is a statement by the party's agent or servant concerning a matter

within the scope of the agency or employment, made during the existence of the relationship. It is undisputed that Reynolds was a servant of EASI, and that the proffered statements were allegedly made during his employment with EASI. Therefore, the statements will be admissible against EASI if they were made within the scope of Reynolds' agency or employment.

> Rule 801 (d) (2) (D) requires the proffering party to lay a foundation to show that an otherwise excludible statement relates to a matter within the scope of the agent's employment.

Wilkinson v. Carnival Cruise lines, Inc., 920 F.2d 1560, 1565 (11th Cir. 1991) (citations omitted).

EASI contends that Reynolds' alleged statements cannot be admissions under Rule 801 (d) (2) (D), because Reynolds has not been identified as a member of EASI's management. While EASI's argument is a mischaracterization of the law, the court nevertheless agrees that the statements are not admissible.

> Nothing in Rule 801 (d) (2) (D) prevents out-of-court statements of low-level employees from coming into evidence as non-hearsay admissions of a party-opponent in appropriate factual scenarios . . . . [T] he inquiry is whether [the employee] was authorized to act for his principal . . . concerning the matter about which he allegedly spoke.

Wilkinson, 520 F.2d at 1566. Thus, the burden is on plaintiff to lay a foundation for the admissibility of Reynolds' alleged statements. Even if Reynolds was a low-level employee of EASI, plaintiff still might secure the admission of his statements if plaintiff demonstrates that Reynolds was

authorized to act by EASI concerning the issuance of written warnings and suspensions. There is no evidence that Reynolds held such authority, however. Rather, the evidence indicates that Reynolds held such authority, however. Rather, the evidence indicates that Reynolds was only a laborer, like plaintiff, who was subject to disciplinary treatment from EASI management. Accordingly, EASI's motion to strike is due to be granted, and the alleged statements of Roger Reynolds will not be considered in deciding EASI's motion for summary judgement.

II. STATEMENT OF FACTS

EASI designs, manufactures, and markets energy absorbing highway crash cushions (and similar products for the protection of motorists and highway maintenance workers). (Declaration of Janis Jones, ¶ 3.) Plaintiff is a native of Greece. He was hired in 1992 at EASI's facility in Pell City, Alabama as an "assembly laborer." (Declaration of Janis Jones; Jerry Bean Deposition 71 - 73.) He was the only employee of Greek national origin. His duties included manufacturing, assembling, and painting highway crash cushion products. (Janis Jones deposition, Exhibit 6.)

A. Plaintiff's complaints and alleged harassment from co-workers

Plaintiff first complained of unwelcome behavior by another assembly laborer, Jeff Llyod, in 1993. On approximately twenty occasions, Lloyd allegedly threw washers at plaintiff, turned off lights in the room where plaintiff was painting or washing parts, and substituted water in the lines of plaintiff's paint gun. (Plaintiff's Deposition, at 66-69, 101-03.) Plaintiff's alleges that he consistently complained about Llyod's harassment for a period of two years. (Plaintiff's Deposition, at

101.) EASI's Assembly Foreman, Jerry Bean, investigated the complaints, but found no corroborating witnesses and took no action. (Bean Deposition, at 29-34.) At some point, Lloyd allegedly apologized to plaintiff, but nevertheless resumed his unwelcome shenanigans thereafter. (Plaintiff's Deposition, at 85-86.)

On February15, 1995, plaintiff submitted a letter to Richard McGauran, EASI Vice President for Manufacturing, stating that Llyod and another assembly laborer, Dwight Madden, would turn off his paint gun and his paint lights. (Plaintiff's Deposition, 84 - 85; Jones Deposition Exhibit 10.) The letter also alleged that Madden threatened him: "I'll fuck you up!" (Jones Deposition, Exhibit 10). In deposition, plaintiff testified that Madden and Llyod also called him names, such as "mother fucker" and "son of a bitch" (Plaintiff's Deposition, at 175.) Plaintiff's wife called EASI's Administrative Support Manger, Janice Jones, on February 16, 1995, and verbally reiterated her husband's written complaints. (Jones Deposition, Exhibit 9.)

Plaintiff's February 15, 1995 letter to McGauran also alleged that he had complained to Jerry Bean, but that Bean simply told him to keep away from Madden. (Jones Deposition, Exhibit 10.) Bean testified that plaintiff made frequent complaints, but that he always investigated each one. (Bean Deposition, at 57, 76-77.) Bean made at least three memoranda of conversations with plaintiff or other EASI employees concerning the complaints.

A handwritten memorandum dated February 17, 1995 details a discussion between plaintiff and Bean concerning plaintiff's complaints about gestures made by other employees. (Bean Deposition, Exhibit 30.) That memorandum records that plaintiff felt "abused" by other EASI employees, including

Bean.

A second memorandum of the same date indicates that Bean confronted Madden and Lloyd, and instructed them to make no gestures at other employees; but Bean also concluded that plaintiff had an "underlying problem away from his place of employment," and that no one at EASI has done anything to warrant his complaints. (Bean Deposition, Exhibit 29.)

Bean's third handwritten memorandum is dated April 25, 1995. (Bean Deposition, Exhibit 32.) On that date, plaintiff complained that other employees were sitting on completed cartridges during a break period. Bean recorded his opinion that plaintiff was "just looking for something to complain about," and that he was "just trying to cause hate and discomfort between himself and other employees." Id.

Plaintiff made other complaints. For example, he complained that Dwight Madden failed to hang pieces for him to paint. (Plaintiff's deposition, at 170-72.) Plaintiff's February 15, 1995 letter also alleges Madden and Lloyd: (1) quit work after Jerry Bean left early on February 13, 1995; (2) worked overtime without proper supplies; (3) left a temporary employee to do their work; (4) "[got] away without respect for their work"; and (5) caused an injury to plaintiff's thumb by their lack of effort. (Defendant's Evidentiary Submission, Exhibit 26.) Finally, Jerry Bean testified that plaintiff consequently complained of doing "all of the work [while] nobody else did anything." (Bean Deposition, at 53.) Bean allegedly moved plaintiff three times to different work areas, but plaintiff had problems with co-workers in each area. (Bean Deposition, at 52; Defendant's Evidentiary Submissions: Exhibit 43.)

B. Alleged harassment by Bean

As Assembly Foreman, Jerry Bean was plaintiff's supervisor, and was responsible for plaintiff's performance evaluations. (Bean Deposition, at 9, 11.) Plaintiff alleges Bean and other supervisors called him "Gus," rather than his given name. Plaintiff further alleges Bean made the following statements: "I can't understand you. I can't do nothing with you" (Plaintiff's Deposition, at 176); "I fix the Gus. I will fire him. I will fix him real good" (id.., at 183); "I hope you not coming back. I hope you stay [in Greece]." (Id., at 187.)[1]

C. Disciplinary actions against plaintiff

Plaintiff alleges that he was suspended from work for rules violations, while non-Greek employees were permitted to continue working despite similar violations. EASI adheres to a "progressive" discipline policy. (Janis Jones Declaration, ¶ 11.) Under this policy, an employee is first verbally warned about any deviation from acceptable behavior or performance. Id. A second offense of the same nature within twelve months results in a written warning being placed in the employee's personnel file. Id. Two written warnings for any reason within a twelve-month period result in a three-day suspension. (Janis Jones Declaration, ¶ 11; Defendant's Exhibit 8.) Thus, an employee should receive one verbal and two written warnings before suspension.

Plaintiff received two verbal warnings for failure to wear a face shield while washing parts before receiving a written warning for that offense on December 16, 1993. (Plaintiff's Deposition at 56-57, 81-82; Defendant's Evidentiary

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[1]This statement allegedly was made when plaintiff told Bean that he was traveling to Greece. (Plaintiff's Deposition, at 187).

Submissions: Exhibit 7.) On August 18, 1994, Bean issued a written warning to plaintiff for failing to wear a respirator while operating a paint spray gun. (Plaintiff's Deposition at 79; Defendant's Evidentiary Submission: Exhibit 11.) Even though that constituted two written warnings within a twelve month period, plaintiff did not receive a three-day suspension on that occasion.[2]

Plaintiff does not dispute that he failed to wear a respirator on August 18, 1994, but alleges Jerry Bean also used a paint spray gun without a respirator, and did not receive any warnings. (Plaintiff's Deposition, at 91-92; Bean Deposition, at 26-27.) Plaintiff further alleges that his "lead person," Doyle Davis, painted without a respirator. (Plaintiff's Deposition, at 91.)

On March 9, 1995, Bean issued a written warning to plaintiff for operating a staple gun contrary to physician's restrictions and Bean's directives. (Plaintiff's Deposition, at 153-57; Movant's Exhibit 14.) This written warning combined with the written warning from August 18, 1994 to give plaintiff two written warnings within twelve months. Thus, on March 22, 1995, plaintiff received a three - day suspension without pay.[3] (Plaintiff's Deposition, at 166; Defendant's Evidentiary Submissions: Exhibit 16.)

On September 7, 1995, Bean issued a written warning to plaintiff because he allegedly disrupted productivity by pretending to take pictures of work performed by other

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[2] Defendant states no suspension was given due to an "oversight" during a transition from manual records to computers. (Janis Jones Affidavit, at ¶ 16.)

[3] In response to that suspension, plaintiff filed his first EEOC charge on March 29, 1995. (Plaintiff's Deposition; at 166-67.)

employees. (Bean Deposition, at 58; Movant's Exhibit 31.) Plaintiff denies taking pictures or pretending to take pictures of anyone. (Plaintiff's Deposition, at 226-227.) That written warning was combined with the warning of March 9, 1995 to again give plaintiff two written warnings in a twelve period. As a result, plaintiff received another three-day suspension.[4] (Plaintiff's Deposition 231-32; Movant's Exhibit 34.)

Plaintiff relies upon records of numerous EASI employees who received two written warnings, but no suspensions. EASI attempts to distinguish these employees in two ways. First, EASI uses the testimony of Janis Jones, its Administrative Support Manager, to state that the "progressive system" was changed from a manual system to a computer system shortly before plaintiff's first suspension. (Jones Declaration, at ¶¶14-16.) Essentially, EASI claims that the system was "imperfect" before plaintiff's first suspension, that he was the first person suspended under the new computer system, and that all employees with conduct-related warnings have been correctly suspended since the implementation of the computer system.

Even with the computer system, EASI is still faced with several employees under the computer program who received two written warnings for attendance violations, but no suspensions. EASI claims that "until recently" the attendance program was treated differently than the conduct-related "progressive" system. (Jones Declaration, at ¶¶12-13.) Allegedly, an employee could receive two written warnings for attendance violations, but no suspension. Id. Thus, EASI contends that the "progressive" system was administered in a non-discriminatory manner.

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[4] In response to that suspension, plaintiff filed his second EEOC charge on September 13, 1995. (Plaintiff's Deposition, at 232-33.)

D. Performance evaluations and termination

EASI employees receive employment evaluations after one month of employment, after three months of employment, and every six months thereafter. (Janis Jones Deposition at 50.) If an employee receives an unsatisfactory evaluation, however, then subsequent evaluations may occur more frequently than at six month intervals. (Janis Jones Deposition at 58.) EASI uses its Supervisor's Manual as a guideline for evaluations of hourly-wage employees like plaintiff. (Janis Jones Deposition, at 41.) The Supervisor's Manual provides that two consecutive, unsatisfactory evaluations are grounds for termination. (Janis Jones Deposition, Exhibit 5.)

From May 13, 1992 through January 25, 1995, plaintiff consistently received satisfactory work performance evaluations. (Bean Deposition, Exhibits 21-24, 27-28.) On August 25, 1995, Bean gave plaintiff his first unsatisfactory performance evaluation. (Bean Deposition, Exhibit 34.) On October 9, 1995, plaintiff received a second unsatisfactory evaluation. (Bean Deposition Exhibit 36.) Consequently, on October 17, 1995, Bean's supervisor, Transportation and Shipping Manager Jeff Bein, issued a memorandum to plaintiff warning that, without improvement, his job was in jeopardy. (Plaintiff's Deposition 238-39; Defendant's Evidentiary Submission: Exhibit 45.) On November 9, 1995, plaintiff received a third unsatisfactory evaluation (Defendant's Evidentiary Submission: Exhibit 46); and, on November 21, 1995, Bein issued a second memorandum warning plaintiff that his job was in jeopardy, and giving him until the end of December to "significantly improve" his performance. (Defendant's Evidentiary Submissions: Exhibit 47.)

On February 5, 1996, EASI was informed that plaintiff had received his Notice of Right to Sue from EEOC. (Plaintiff's Exhibit 4.) On February 13, 1996 plaintiff received

a fourth unsatisfactory evaluation from Bean. (Bean Deposition at 64-65, Exhibit 38.) Thereafter, Jerry Bean and Jeff Bein discussed plaintiff's failure to improve his performance, and made the decision to terminate his employment. (Bean Deposition at 69-70.) On February 19, 1996, plaintiff was terminated. (Defendant's Evidentiary Submission: Exhibit 49.)

E. Timing of EEOC charge and alleged acts of discrimination

In part, plaintiff bases his Title VII retaliation claim on the temporal proximity between his EEOC charges and right to sue letter, and adverse actions taken against him by EASI. Plaintiff filed his first charge with the EEOC on March 29, 1995, one week after his

first three-day suspension. (Plaintiff's Deposition, at 166-67; Defendant's Evidentiary Submission Exhibit 22.) His next performance evaluation occurred almost five months later on August 25, 1995, and was his first unsatisfactory evaluation. (Defendant's Evidentiary Submission: Exhibit 43.)

Plaintiff filed his second EEOC charge on September 13, 1995, five days after his second disciplinary suspension. (Plaintiff's Deposition, at 232-33; Defendant's Evidentiary Submission: Exhibit 34.) Plaintiff received his second unsatisfactory evaluation on October 9, 1995. (Defendant's Evidentiary Submission: Exhibit 44.)

Finally, on February 5, 1996, EASI was informed by the EEOC that a "right to sue" letter had been issued to plaintiff. (Plaintiff's Exhibit 4.) Plaintiff received another unsatisfactory evaluation on February 13, 1996, and was discharged on February 19, 1996. (Defendant's Evidentiary Submission: Exhibit 49.) The memorandum of discharge stated plaintiff was terminated for "below standard performance review . . . for

period as described in 11/21/95 letter." (Defendant's Evidentiary Submission: Exhibit 49).

III. PLAINTIFF'S CLAIMS UNDER 42 U.S.C. § 1981.

"[P]laintiff concedes that he may not maintain his claim under 42 U.S.C. § 1981 and thus does not address the issue in this argument." (Plaintiff's Brief, at 11 n.1). Plaintiff correctly concedes this point, because § 1981 does not provide protection against discrimination based on national origin. *See Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987); Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 735 (5th Cir. 1986). Accordingly, such claims are due to be dismissed.

IV.PLAINTIFF'S DISPARATE TREATMENT CLAIMS

Plaintiff bears the burden of proving, by a preponderance of the evidence, that defendants intentionally discriminated against him because of his national origin. That can be done either by direct or circumstantial evidence. When plaintiff's evidence is circumstantial in nature, as is the case here, the Supreme Court has developed a three stage framework for focusing the inquiry. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 5. Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d. 407 (1993).

Plaintiff must first establish a prima facie case of discrimination based on national origin. If plaintiff does so, then at the second stage of analysis the burden of production shifts to defendant to rebut the presumption of intentional discrimination raised by the *prima facie* showing through articulation of legitimate, nondiscriminatory reasons for the

contested employment action. *Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093. If defendant does so, then in the final step of the inquiry plaintiff must have an opportunity to demonstrate that defendants' stated reasons merely are pretexts for unlawful, discriminatory motives. *Id.*

A. Denial of promotional opportunities, job assignments, and "other terms and conditions of employment"

Plaintiff's complaint alleges that EASI "discriminated on the basis of nationality against the plaintiff with respect to discipline, discharge, promotions, job assignments and other terms, conditions, and privileges of employment." (Plaintiff's Complaint, ¶ 20.) Plaintiff "submits that he does not attempt to maintain claims for promotions, job assignments, or other terms and conditions of employment (except as any such allegations are encompassed by his harassment allegations)." (Plaintiff's Brief at 11 n.1.) Plaintiff correctly concedes this point, because those claims are outside the scope of his EEOC charges. *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 466 (5th Cir. 1970). Accordingly, those claims are due to be dismissed.

B. Disciplinary discrimination claims

In order to establish a prima facie case of discrimination in an employee discipline case,

> the plaintiff, in addition to being in a protected class, must show either (a) that he did not violate the work rule, or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary procedures enforced against him were more sever than those enforced against other persons who engaged in similar misconduct."

Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989).

1. Denial of work rule violation

a. Plaintiff's denial of violating a work rule.

Plaintiff's denial of violating a work rule. Plaintiff first attempts to establish a prima facie case of disciplinary discrimination by stating that he did not commit one of the work rule violations with which he was charge. He denies the September 7, 1995 allegation that he disrupted productivity by taking pictures (or pretending to take pictures) of work at EASI'S plant. In deposition, plaintiff denied owning a camera, taking pictures, or pretending to take pictures. (Plaintiff's Deposition, at 226-27.) That testimony presents sufficient evidence to establish plaintiff's prima facie case.

b. EASI's non-discriminatory reason

Because plaintiff has established a prima facie case, the burden shifts to EASI to produce a legitimate, non-discriminatory reason for issuing the warning on September 7, 1995. Burdine, 450 U.S. at 253, 101 S.Ct. at 1093. EASI attempts to do so by stating that Jerry Bean received complaints from other employees that plaintiff was taking pictures, that Bean conducted an investigation, and that Bean honestly believe the charge. An employer's honest belief that the employee committed the violation is sufficient to rebut a prima facie case. Jones v. Gerwins, 874 F.2d at 1540.

c. Evidence of Pretext

Bean's deposition does not support defendant's argument, however. Rather, Bean testified that he "couldn't substantiate that [plaintiff] was or was not" taken pictures.

(Bean Deposition, at 60.) He, therefore, issued a warning for "pretending" to take pictures. Id. That raised genuine issues of material fact regarding Bean's belief, and precludes summary judgment.

2. Discriminatory enforcement of disciplinary procedures

a. Plaintiff's evidence

Plaintiff also seeks to establish a prima facie case of disciplinary discrimination by demonstrating that other employees engaged in similar misconduct, but were not subjected to the same discipline. To do so, plaintiff offers two types of evidence. First, plaintiff testified that Jerry Bean and Doyle Davis also used a paint spray gun without a respirator, the violation that resulted in his August 18, 1994 warning. (Plaintiff's Deposition, at 91-92.) Bean admits spraying without a respirator for short period of time. (Bean Deposition, at 91.) EASI does not dispute that Bean failed to give himself a warning. Plaintiff thus has demonstrated that at least one employee engaged in similar misconduct, but did not receive a written warning.

Plaintiff also submits evidence related to fourteen EASI employees who received two written warnings for work rule or attendance violation, but no suspensions. (Janis Jones Deposition, Exhibits. 20 and 4.)[5] EASI does not dispute the information contained in those records. Therefore, plaintiff has

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[5]Exhibit 20: Jeffrey S. Hughes; Anthony S. Malone; Deborah J. Castleberry; Robert T. Hosmer. Exhibit 4; Timothy W. Haffron; Jerry W. Dulaney; Lawrence D. Jenkins, Jr.; Ronald M. Lawyer; Terrell D. Lewis; Sheldon G. Mahar; Roger A. Stewart; Jeffery O. Williams; Rick C. Goodwin; Donald L. Young.

established a prima facie case of disciplinary discrimination.

b. EASI's non-discriminatory reason, and evidence of pretext.

EASI's only non-discriminatory reason for Bean's failure to issue himself a warning for not wearing a respirator is that Bean only painted for short periods of time, while plaintiff was required to paint for extended periods. Bean further testified that he was not exposed to spray on the occasions he painted. (Bean Deposition at 26-27.) However, EASI presented no evidence of company rules forgiving Bean's failure to use a respirator. Therefore, there is sufficient evidence to withstand EASI's motion for summary judgment.

EASI's non-discriminatory reason for plaintiff's suspension essentially boils down to the use of a computer system. In its brief, EASI attempts to persuade this court that all suspensions are automatically determined by a computer system that was installed in 1994. According to EASI, after the system came on line, all employees who received two conduct related warnings were suspended[6] EASI acknowledges that some employees could have received attendance warnings under the computer system without suspensions.[7] EASI attempts to explain this discrepancy by stating that "until recently," attendance warnings were administered differently

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[6]Of course, plaintiff received a second written warning within a twelve month period on August 18, 1994, but did not receive a suspension. EASI attributes this failure to suspend to a probable "oversight" during the transition from manual records to computers. (Janis Jones Deposition, at ¶16.)

[7]See (Janis Jones Deposition, Exhibit 20): Anthony S. Malone (violations on 2/9/94 & 7/18/94); Deborah J. Castleberry (violations on 12/5/95 and 4/30/96); Robert T. Hosmer (violations on 10/25/94 and 11/26/94.)

than conduct-related warnings. (Jones Declaration, ¶ 12.) However, EASI fails to state the "recent" date on which the policy was changed, and baselessly attempts to argue that the new attendance program began in 1995. (Letter of Defendant's counsel, dated April 22,1997.)

In fact, EASI"s entire explanation fails because of one employee. Deborah J. Castleberry received written warnings for attendance violations on December 5, 1995 and on April 30, 1996, but she was not suspended. (Janis Jones Deposition, Exhibit 20, pg 10.) Castleberry's first warning occurred late enough in 1995 that, even crediting EASI's explanation, she should have come within the "new" attendance program. Yet, the supposedly foolproof computer system still failed to indicate that Castleberry should receive a suspension.

The system actually does not determine the issuance of suspensions. Instead, it merely is a electronic system for holding data, and human management retains responsibility for deciding the merit of suspensions. Janis Jones, Administrative Support Manager for EASI"s plant, stated that she enters warnings into the computer system, which informs her if the employee in question has another written warning. (Jones Deposition, at 28.) She then refers to EASI's vice president for manufacturing to determine a suspension should be given. (Jones Deposition, at 27-28) Furthermore, Jones indicated that she still uses the employee's personnel file as a basis for determining number of written warnings issued. Id.

Jones' testimony, combined with the failure to suspend Castleberry, casts considerable doubt upon EASI's asserted reasons for suspending plaintiff. Plaintiff relies upon Jones' testimony and Castleberry's records to assert that EASI's asserted reasons are pretextual. The court therefore finds sufficient evidence of pretext to withstand EASI's motion for summary judgment.

C. Discharge discrimination claims

1. *Prima facie* case

In order to establish a prima facie case of discrimination in discharge, plaintiff must prove:

(1) he is a member of a protected class; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) he was replaced by someone outside of the protected class. *Jones v. Lumberjack Meats, Inc.*, 680 F.2d 98, 101 (11th cir. 1982); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1526 (11th Cir. 1991).

Defendant asserts that plaintiff cannot prove he was qualified for the job from which he was discharged, because he received poor performance evaluations. As noted by EASI, poor performance evaluations can be relevant at the prima facie stage. *See Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1227 n.3 (11th Cir. 1992). Even so, qualification for a job position may be established by evidence that plaintiff performed his responsibilities for several years without complaint. *Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1520 (11th Cir. 1990). Plaintiff presented evidence that he received satisfactory performance evaluations for a period of two years. (Bean deposition Exhibits 21-24, 27-28.) Thus, he has fulfilled the first element of his prima facie case.

EASI further alleges plaintiff can not prove he was replaced by someone outside the protected class. In support of this argument, EASI states that there is "no evidence that he was replaced at all." (Defendant's brief, p. 8.) However, Jerry Bean testified that other employees filled in for plaintiff after his termination, that other persons have been hired to fill EASI's needs, and that all of the new employees are American. (Bean deposition at 71-73.) This testimony is sufficient to

fulfill the fourth element of plaintiff's prima facie case.

2. Non-discriminatory reasons, and pretext.

EASI asserts that it discharged plaintiff for receiving four consecutive unsatisfactory performance evaluations. Each evaluation was given to plaintiff by Jerry Bean, however, and plaintiff testified that Bean made the following statements to him: "I can't understand you. I can't do nothing with you" (Plaintiff's Deposition, at 177); "I fix the Gus. I will fire him. I will fix real good" (*id.*, at 183); "I hope you not coming back. I hope you stay [in Greece]." (*Id.*, at 187.)

Those statements are evidence that the real reason for plaintiff's termination was not poor performance evaluations. "[O]nce a plaintiff has established a prima facie case and has put on sufficient evidence to allow a fact finder to disbelieve an employer's proffered explanation for its actions, that alone is enough to preclude entry of judgment as matter of law." *Combs v. Plantation Patters,* 106 F.3d 1519, 1532 (11th Cir. 1997). Accordingly, EASI's motion for summary judgment is due to be denied as to that claim.

D. Hostile work environment claim

To prove a prima facie case of hostile working environment, plaintiff must show: (1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment complained of was based upon the his national origin; (4) the harassment complained of affected a "term, condition, or privilege" of employment, in that it was "sufficiently severe or pervasive to alter the condition of [the victim's] employment and create an abusive working environment"; and (5) the employer either knew, or should have known of the harassment, but failed to take prompt remedial action and, therefore, is liable under principles of respondeat

superior. *Boutros v. Canton Regional Transit Authority*, 997 F.2d 198, 203 (6th Cir. 1993); *see also Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1987).

There is no dispute that plaintiff's Greek national origin places him in a protected class. When viewed in a light most favorable to plaintiff, there also are sufficient facts to find that he was subjected to unwelcome harassment. Yet, plaintiff cannot show that the alleged harassment was based on his national origin, or that it was sufficiently severe and pervasive to alter his employment.

1. Harassment based on national origin

Plaintiff's primary complaints of harassment related to actions of coworkers, such as throwing washers, turning off his paint gun, turning off his paint lights, and using vulgar language. His EEOC charges also indicate that he believed Jerry Bean's written warnings, poor performance evaluations, and suspensions constituted harassment. However, none of those alleged acts of harassment contain any reference to plaintiff's national origin, or any perceived characteristic associated with his national origin. Rather, they appear to be the result of personality conflicts between plaintiff and coworkers caused by plaintiff's numerous on-the-job complaints. [8] Personality conflicts are insufficient to impose liability under Title VII. *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1558 (11th Cir. 1995).

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[8] As noted in the statement of facts, plaintiff made complaints about alleged harassment, but he also made numerous complaints about the quality of work performed by others at EASI. Those work-related complaints, combined with the lack of evidence pointing to national origin as the basis for harassment, indicate that there were personality conflicts between plaintiff and his coworkers.

The only instances of alleged harassment which can possibly be tied to plaintiff's nationality are statements supposedly made by Jerry Bean which were first revealed in plaintiff's deposition. Allegedly, Bean made the statements: 'I hope you stay [in Greece]"; and, "I can't understand you. I can't do nothing with you." While these statements can be related to plaintiff's national origin, they still are not the type of statements which prove harassment based on national origin. *See Amirmokri v. Baltimore Gas & Electric Company,* 60 F.3d 1126, 1130 (4th Cir. 1995) (Arabian plaintiff called the "local terrorist" and "camel jockey"); *Boutros v. Canton Regional Transit Authority,* 997 F.2d 198 (6th Cir. 1993) ("rich Arab" and "camal jockey"); *Pacanza v. Shell Oil Company*, 1997 WL 227980 at *11 (insulting plaintiff's intelligence insufficient to show discrimination based on national origin).

2. Harassment affecting a term or condition of employment

Even if the court assumes that Bean's statements demonstrate an animus toward plaintiff's national origin, plaintiff still cannot show that they were sufficiently severe or pervasive to alter the conditions of his employment and create an abusive environment. *Sparks v. Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987).

"Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 144 S.Ct. 376, 370, 126 L.Ed.2d 295 (1993). In evaluating whether harassment is sufficiently severe or pervasive to bring it within Title VII's purview, courts must examine the totality of circumstances, including: "[t]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23, 114 S.Ct. at 371. After careful consideration of the entire record, this court concludes that the conduct of which plaintiff complains is neither sufficiently severe nor pervasive to create an environment that a reasonable person would find hostile or abusive.

As noted above, the only alleged harassment directed towards plaintiff and possibly based upon national origin consists of two statements: "I hope you stay [in Greece]"; and, "I can't understand you. I can't do nothing with you." Under the standards set forth in *Harris*, those statements cannot be characterized as severe or pervasive. *See Valdez v. Mercy Hospital*, 961 F.2d 1401, 1402-03 (9th Cir. 1992) (personality conflicts combined with ethnic jokes and "Mexican Sex Manual" not severe or pervasive); *Chua v. St. Paul Federal Bank for Savings*, 1996 WL 312079 at *4-5 (N.D. Ill. 1996) (not severe or pervasive where plaintiff was called "gook," dialect mocked as "slime language," supervisor stated "you Chinese, Filipino – ber, ber, ber [mocking dialect]"); *Morales v. Human Rights Division*, 878 F.Supp. 653 (S.D.N.Y. 1995) (not severe or pervasive when plaintiff called "Armando's Hispanic Princess" and asked "why persons of Hispanic descent underdress their children in the winter"); *Kaplan v. Banque Nationale de Paris*, 1995 WL 753900 at *6 (S.D.N.Y. 1995) four anti-semitic remarks over a four month period were isolated offensive utterances which could not form basis for harassment claim). Because plaintiff has failed to prove the fourth element of a *prima facie* case of hostile work environment, summary judgment is appropriate.

VII. PLAINTIFF'S RETALIATION CLAIM

The familiar burden-shifting scheme developed by the Supreme Court for disparate treatment claims under Title VII

applies equally well to Title VII retaliation claims. See *Donnellon v. Fruehauf Corporation*, 794 F.2d 598, 600, reh'g denied, 800 F.2d 267 (11th Cir. 1986). Thus, a plaintiff must first establish a *prima facie* case by showing: (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the protected expression and the adverse action. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993).

A. Plaintiff's statutorily protected expressions

Section 704(a) of Title VII prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title]." 42 U.S.C. § 2000e-3(a). Those two clauses of Section 704(a) are respectively known as the "opposition" clause and the "participation" clause.

Plaintiff's three EEOC charges clearly constitute protected expressions under the "participation" clause. *See, e.g., Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1120, 1138 (5th Cir. 1981). Plaintiff also argues that his workplace complaints were statutorily protected expressions, which this court will treat as an attempt at protection under the "opposition" clause.

In order to establish a *prima facie* case under the "opposition" clause, plaintiff must show that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices. *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997).

> It is critical to emphasize that a plaintiff's burden under this standard has both a subjective

> and an objective component. A plaintiff must not only show that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented.

Id. Plaintiff may have had a good faith belief that his workplace complaints related to unlawful employment practices, but the facts and record present no objectively reasonable basis to conclude that the conduct of his coworkers was based upon plaintiff's national origin.

Plaintiff complained in 1993 about washers being thrown at him by Jeff Lloyd. On February 15, 1995, plaintiff complained that Lloyd and Jeff Madden would turn off his paint gun and his paint lights. He further alleged that Madden and Lloyd used vulgar language towards him. On February 17, 1995, plaintiff complained about gestures made by Madden and Lloyd. Finally, plaintiff complained on April 25, 1995 about employees sitting on completed cartridges during breaks.

None of those complaints can be objectively related to plaintiff's national origin. There simply are no references to plaintiff's Greek heritage, or to any perceived characteristics of persons of Greek ancestry. Without any objective references to his national origin, plaintiff's claims under the "opposition" clause must fail. Therefore, this court will continue its analysis only by reference to plaintiff's EEOC charges.

B. Adverse employment actions

Plaintiff argues that he suffered two adverse employment actions. To begin with, he alleges that his first unsatisfactory performance evaluation was directly related to the filing of his initial EEOC charge. Second, he alleges that

his discharge was directly related to his receipt of a "right to sue" letter from the EEOC.

Poor performance evaluations, alone, rarely constitute "adverse employment actions." *Smart v. Ball State University*, 89 F.3d 437, 442 (7th Cir. 1996). Furthermore, "adverse employment actions" must be such that they rise to the level of "ultimate employment decisions," such as hiring, granting leave, discharging, promoting, and compensating. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). Where poor performance evaluations directly result in a loss of job or pay, however, they can rise to the proper level of adversity. *See Gustovich v. AT & T Communications, Inc.*, 972 F.2d 845, 847 (7th Cir. 1992); *Smart*, 89 F.3d at 442.

There is no dispute that plaintiff's performance evaluations directly resulted in the loss of his job. Thus, plaintiff's performance evaluations, as well as his discharge, will be considered "adverse employment actions."

C. Causal relation

To establish a causal relation between protected activities and adverse employment actions, plaintiff must merely show "the protected activity and the adverse action were not wholly unrelated." *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993) (citations omitted). "At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took adverse employment action." *Id.* (citations omitted). Furthermore, a short period of time between the filing of an EEOC complaint and an adverse employment action can be sufficient to establish the element of causation. *See Donellon v. Fruehauf Corporation*, 794 F.2d 598, 601 (11th Cir. 1986).

Jerry Bean testified that he was informed of plaintiff'

first EEOC charge when EASI's "front office" received it. (Bean Deposition, at 42.) Plaintiff received his first unsatisfactory evaluation during the first review period thereafter.

Also, plaintiff was discharged within two weeks of receiving his right to sue letter. Bean's knowledge of the complaints, his participation in the decision to terminate, and the temporal proximity between the EEOC complaints and alleged retaliation are sufficient to establish a *prima facie* case of retaliation. See *Donnellon*, 794 F.2d at 600-01 (one month delay between complaint and discharge sufficient to establish causal connection).

D. EASI's reason for termination and plaintiff's showing of pretext

EASI contends that plaintiff was discharged for his failure to improve his performance, as required by the November 31, 1995 memorandum. In *Swanson v. General Services Administration*, 110 F.3d 1180 (5th Cir. 1997); the Fifth Circuit held that a defendant must explain both the discharge and the timing of the discharge, where timing is the basis for proving the "causation" element of retaliation. 110 F.3d at 1188. This court is persuaded that opinion will be followed by this Circuit. EASI terminated the plaintiff on February 19, 1996 for poor performance evaluations given the previous year. EASI must explain why it waited two months to fire plaintiff before its nondiscriminatory reason is accepted by this court. Consequently, summary judgment is inappropriate.

VI. CONCLUSION

For the foregoing reasons, the court concludes defendant's motion to strike is due to be granted, and defendant's motion for summary judgment is due to be granted

in part, but denied in part. An order consistent with this memorandum opinion will be entered contemporaneously herewith.

DONE this the 17th day of April, 2000.

s/ Lynwood Smith
United States District Judge

APPENDIX D – ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED JULY 17, 1997

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NUMBER
96-S-1129-S

CONSTANTINOS STAVRIDIS,

Plaintiff,

vs.

ENERGY ABSORPTION SYSTEMS, INC.,

Defendant.

ORDER

In accordance with the memorandum opinion entered contemporaneously herewith, it is ORDERED that defendant's motion to reconsider is denied.

DONE this the 24th day of September, 1997.

/s/Lynwood Smith
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NUMBER
96-S-1129-S

CONSTANTINOS STAVRIDIS,

Plaintiff,

vs.

ENERGY ABSORPTION SYSTEMS, INC.,

Defendant.

MEMORANDUM OPINION

This action is before the court on defendant's motion to reconsider the court's order of July 17, 1997, which granted partial summary judgment. Defendant now asks the court to grant summary judgment on all claims. Upon review of the motion and brief filed therewith, the court determines defendant's motion is due to be denied.

Plaintiff is a native of Greece who worked in defendant's plant in Pell City, Alabama, and alleges defendant discriminated against him because of his national origin in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e *et seq.* The facts of this case are thoroughly discussed in this court's memorandum opinion of July 17, 1997, and will not be

restated here.

I. STANDARD FOR RECONSIDERATION

"[A] denial of summary judgment is an interlocutory order, which the court may reconsider and reverse any time before entering final judgment." *Millar v. Houghton*, 115 F.3d 348, 350 (5th Cir. 19997). While this court has broad discretion to reconsider its previous order, it will not allow defendant to use the motion for reconsideration as a second attempt at summary judgment.[1] Indeed, many of the arguments raised in defendant's motion were never raised in its original brief in support of summary judgment, or its letter brief in reply to plaintiff's opposition to summary judgment. Thus, the court will only reconsider those facts and arguments which were originally presented.

II. DISPARATE TREATMENT CLAIMS

A. Disciplinary Discrimination

1. Warning for pretending to take pictures

On September 7, 1995, plaintiff received a written warning for pretending to take pictures of work performed by other employees, but he denied committing the violation. (Bean

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[1]The deadline for dispositive motions was February 28, 1997. (See Order of August 8, 1996.) The three month delay between submission of the motion for summary judgment (i.e., April 2, 1997: see submission Order entered March 5, 1997) and this court's ruling on that motion indicate the heavy workload of all judges serving on the United States District Court for the Northern District of Alabama. Defense counsel are admonished to be mindful of that fact and, in the future, to make all (and their best) arguments in the first instance.

deposition at 58-60). Plaintiff's supervisor, Jerry Bean, gave plaintiff the warning, and testified:

> A. I put pretending [on the written warning], because [the co-workers] said he had his hands up to his face like he was taking pictures.
>
> Q. There were no other employees that said he was pretending to take pictures?
>
> A. No. I put that in there because I couldn't substantiate that he was or was not. I had two saying he was, and he said he was not. So I said he was or was pretending to.

(Bean deposition at 60.) Defendant contends "it is clear from Bean's testimony that he was convinced Plaintiff had engaged in disruptive conduct, but was unsure what specific form this conduct took." (Motion to reconsider at 3). Thus, defendant relies upon the proposition that an honest belief that an employee committed a violation is sufficient to rebut any inference of discrimination. *See Jones v. Gerwins*, 874 F.2d 1534, 1540 (11th Cir. 1989).

The court is not convinced that Bean's testimony is as "clear" as defendant would like to characterize it. A reasonable fact finder could review Bean's testimony, and conclude that Bean accused plaintiff of pretending to take pictures simply because he could not substantiate any of the claims. Thus, the motion to reconsider on that ground is due to be denied.

2. Warning for painting without a respirator

Plaintiff received a written warning on August 18, 1996 for painting parts without a respirator, and claims the warning was discriminatory, because Bean painted without a respirator, but did not give himself a warning. Defendant argues that this court erred in considering Bean as a comparator for plaintiff's claim, because Bean, as plaintiff's supervisor, was not "similarly situated" to plaintiff. (Motion to reconsider at 4-6.)

> As part of the Title VII plaintiff's *prima facie* case, the plaintiff must show that his employer treated similarly situated employees outside his classification more favorably than herself [sic]. ... To make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects.

Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)(emphasis supplied)(citations omitted). The court does not believe that an employee's status as supervisor or subordinate is relevant to violation of safety rules. Even so, defendant failed to argue in its original motion for summary judgment that Bean and plaintiff were not similarly situated.[2] Furthermore, plaintiff's brief clearly pointed to Bean as a comparator, but defendant made no "similarly situated" argument in its reply brief. Consequently, the court will not consider defendant's new argument, and the motion to

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[2]Defendant only distinguished Bean on the ground that he painted "ittie bittie" pieces of equipment for short periods of time, while plaintiff painted for prolonged periods. (Brief in support of summary judgment at 6 n. 4.)

reconsider related to the discipline of Jerry Bean is due to be denied.

3. Comparison to other employees

In opposing summary judgment, plaintiff pointed to several non-Greek employees who (like plaintiff) received two written warnings for safety violations, but (unlike plaintiff) were not suspended. Defendant relied upon a recently-implemented computer system to distinguish those employees from plaintiff. According to defendant, plaintiff's suspension was mandated by the computer system, but the failure to suspend the comparable employees was excusable because their warnings occurred before the system was implemented. The court found that the computer system was not as foolproof as defendant would characterize it, because Deborah Castleberry (an attendance policy violator[3]) was not suspended after receiving two written warnings.

Defendant argues that the Castleberry evidence is the only evidence in dispute, and the evidence is insufficient to withstand summary judgment. (Motion to reconsider 7-8.) By discrediting the computer system, however, the Castleberry evidence also questions the failure to discipline those employees who received two written warnings before the system was implemented: Timothy W. Daffron, Jerry E. Dulaney, Ronald M. Lawyer, and Terell D. Lewis. The failure to discipline other, non-Greek, employees is substantial

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[3]Defendant attempts to distinguish attendance violations from safety violations by demonstrating that, until 1995, employees could incur two attendance violations without discipline, even under the computer. Even so, defendant does not dispute that the supposedly foolproof computer failed to suspend Castleberry, even though her violations occurred in December of 1995 and January of 1996.

evidence of discrimination, sufficient to withstand summary judgment.[4]

Thus, defendant abandons its computer system argument (and company policy) on motion for reconsideration and asserts that "Plaintiff was treated identically, receiving two written warnings without suspension, but was suspended on the very next occurrence." (Motion to reconsider at 6.) That argument was not presented in defendant's original motion for summary judgment and will not be considered now.

B. Discharge Discrimination

1. Qualification for position

Defendant argues plaintiff cannot present a *prima facie* case of discharge discrimination, because he cannot prove he was qualified for his position. This court previously found that plaintiff's evidence of satisfactory performance evaluations for a period of two years was sufficient to fulfill his *prima facie* case. In its motion to reconsider, defendant argues that plaintiff was not qualified, because his evaluations were "barely satisfactory." (Motion to reconsider at 9.)

Qualification for a job position may be established by evidence that plaintiff performed his responsibilities for several years without complaint. *Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1520 (11th Cir. 1990). Moreover, plaintiff can fulfill that burden by demonstrating his performance reviews were

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[4]Defendant also argues by footnote that plaintiff failed to demonstrate the comparators were "similarly situated," because they had different supervisors and different disciplinary standards. (Motion to reconsider at 6 n. 2.) Defendant did not raise that argument at summary judgment, and it will not be considered now.

"generally satisfactory." *Settle v. K Mart Corp.*, 857 F.Supp. 955, 957 (M.D. Fla. 1994); *Bell v. Desoto Memorial Hospital, Inc.*, 842 F.Supp. 494, 497 (M.D. Fla. 1994). The court concludes plaintiff presented sufficient evidence that his performance reviews were generally satisfactory; therefore, the motion to reconsider plaintiff's *prima facie* case is due to be denied.

2. Evidence of pretext

In its argument in support of summary judgment, defendant presented a legitimate non-discriminatory reason for discharging plaintiff: four consecutive unsatisfactory employment evaluations. Even so, this court found evidence of pretext in the following statements made by Jerry Bean to plaintiff: "I can't understand you. I can't do nothing with you" (plaintiff's deposition at 177); "I fix the Gus. I will fire him. I will fix real good" (*id.* at 183); "I hope you not coming back. I hope you stay [in Greece]." (*Id.* at 187.) Defendant argues those statements are not evidence of pretext, because the second comment was not directed at plaintiff, and the remaining comments are insufficient to fulfill plaintiff's burden.

Defendant correctly notes that Jeff Bean made comments similar to "I fix the Gus. I will fire him" when talking about one of plaintiff's co-workers. (Plaintiff's deposition at 183-84.) Plaintiff confirmed, however, that Bean threatened to "fix" and "fire" him.

> Q. [by defendant's counsel] Is there anything else about Jerry Bean that you are complaining about in this lawsuit? Let me make sure I've got a complete list. He said I will fix you real good?
>
> A. Yes.

R. He watched you?

A. Yes.

Q. Said I am going to fire you?

A. Yes.

(*Id.* at 186 (emphasis supplied).)

Jerry Bean gave the evaluations which led to plaintiff's termination. Thus, plaintiff's testimony is sufficient evidence to disbelieve defendant's proffered explanation for its actions, and the motion to reconsider is due to be denied. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997).

III. RETALIATION

This court refused to grant summary judgment for defendant on plaintiff's retaliation claim, because defendant failed to explain the timing of plaintiff's discharge: "EASI terminated the plaintiff on February 19, 1996 for poor performance evaluations given the previous year. EASI must explain why it waited two months to fire plaintiff before its nondiscriminatory reason is accepted by this court." (Memorandum opinion at 29.) On reconsideration, defendant claims that plaintiff was given additional time to improve his performance because of sexual harassment allegations which were made against him. (Motion to reconsider at 12.)

In making that argument, however, defendant omits crucial language from a memorandum which helped guide this court's decision.

> In October your performance review was less than a 2.0. At that time you were placed on probation and warned that if immediate improvement was not made you would be subject to disciplinary action, up to and including termination. Your most recent review in November is still less than a 2.0. However, management feels that your performance may have been affected by the recent sexual harassment allegations made against you. Therefore, you are being reassigned to work with different employees and will be given until the end of December to make significant improvement in your performance.
>
> Please understand that your job is in jeopardy if you do not make immediate improvements. This is your last chance to demonstrate that you wish to remain employed with Energy Absorption Systems, Inc.

(Movant's exhibit 47.) The emphasized text is conveniently deleted from defendant's motion to reconsider.

Because of the sexual harassment allegations, plaintiff was given until the end of December of 1995 to improve his performance. Yet, no performance evaluation was conducted at the end of December, or at any time before the February 13, 1996 evaluation which led to plaintiff's termination. That evaluation occurred eight days after defendant learned plaintiff received a notice of right to sue from the EEOC.

Defendant still fails to explain why it waited two months to discharge plaintiff, when he only was given until the end of the year to demonstrate improvement. Further, defendant fails to explain the timing between the notice of right to sue and the evaluation. Accordingly, the motion to reconsider the court's retaliation ruling is denied.

IV. CONCLUSION

For the foregoing reasons, defendant's motion to reconsider is due to be denied. An order consistent with this memorandum opinion will be entered contemporaneously herewith.

DONE this the 24th day of September, 1997.

/s/Lynwood Smith
United States District Judge

APPENDIX E – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED AND FILED JANUARY 19, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-6828-II

CONSTANTINOS STAVRIDIS,

Plaintiff-Appellee,

versus

ENERGY ABSORPTION SYSTEMS, INC.,Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____ F.2d _____)

Before: ANDERSON, Chief Judge, TJOFLAT, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Peter T. Fay
SENIOR UNITED STATES CIRCUIT JUDGE